NO. 21636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MORA ZARAGOZA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

On January 1, 1966, a six-count indictment was returned against appellant and Ernest Anthony Rivera by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2].[1]

Counts Four, Five and Six charged that appellant and codefendant Rivera sold, transported, and concealed illegally imported marihuana. Appellant was convicted on Counts Four, Five and Six [C. T. 16].

Appellant filed a timely notice of appeal [C. T. 20].

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[1] C. T. refers to Clerk's Transcript.

The District Court had jurisdiction under Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176a. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTE INVOLVED

Title 21, United States Code, Section 176a provides:

> "Notwithstanding any other provisions of law, whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than $20,000 . . .
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

III.

STATEMENT OF THE CASE

Appellant was indicted on January 12, 1966, and charged with the concealment and sale of marihuana, as well as a failure to obtain a written order form for the transfer of marihuana [C. T. 2-7].

Appellant was arraigned on February 14, 1966, at which time he entered a plea of not guilty to Counts Four, Five and Six [C. T. 9].

Trial by jury commenced on February 15, 1965, before the Honorable Francis C. Whelan, United States District Judge [C. T. 11]. Appellant was found guilty on Counts Four, Five and Six on February 21, 1966 [C. T. 15].

Appellant filed a notice of appeal on May 2, 1966 [C. T. 20].

IV.

STATEMENT OF THE FACTS

On December 29, 1965, codefendant Rivera sold marihuana to Federal Bureau of Narcotics Agent William Turnbou [R. T. 106].[2/] Prior to the actual exchange of money for marihuana on that date, Agent Turnbou and codefendent Rivera drove to the vicinity of appellant's home at 3711 Hellman Street, Los Angeles [R. T. 103-104]. Rivera left the vehicle and entered appellant's house

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[2/] R. T. refers to Reporter's Transcript.

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moments later [R. T. 261, 305, 550]. Rivera left $500 of official advance funds, given to him earlier by Agent Turnbou [R. T. 105], at Zaragoza's house; Zaragoza placed this money under some cotton beneath a Christmas tree [R. T. 196-7, 309, 552-3].

A few minutes after his arrival, Rivera left appellant's apartment with approximately five kilograms of marihuana [R. T. 187, 265, 306, 77]. Rivera was arrested moments later, after he had delivered the marihuana to Agent Turnbou [R. T. 108]. A third man, Mr. Chavez, was observed entering the apartment of appellant [R. T. 264-5]. Chavez left the apartment prior to Rivera's departure, and was stopped by narcotics agents a few blocks away. At that time, Chavez had in his possession a $10 bill, which had been given to him by Zaragoza; the bill was one of the previously recorded bills given to Rivera by Agent Turnbou [R. T. 265-6, 553, 556].

Approximately one-half hour after Rivera's departure from appellant's home, Federal Bureau of Narcotics agents arrested appellant at his home and searched his house [R. T. 193, 195]. $490 in official advance funds were found under Zaragoza's Christmas tree [R. T. 308].

At the time of his arrest and after appellant had been advised of his constitutional rights and acknowledged that he understood them, appellant said to Agent Durel, "You got the money, that's all there is" [R. T. 197-8, 309].

A search of appellant's person uncovered a marihuana

cigarette in his pocket [R. T. 195].

V.

QUESTIONS PRESENTED

1. In the absence of a motion by either defendant, was it plain error not to require separate trials?

2. Should a judgment of acquittal have been granted based upon an informant's assertion of the Fifth Amendment privilege, where he was called as a witness for the codefendant?

3. Was it plain error not to instruct the jury as to the entrapment of appellant?

4. Does the record disclose an unreasonable search and seizure?

5. Is the presumption established by Title 18, United States Code, Section 176a, constitutional?

VI

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT A SEVERANCE.

Joinder of appellant and co-defendant Rivera in the same indictment was proper, since they participated in the same transactions and series of transactions. Fed. R. Cr. Proc., Rules 7-8; Williamson v. United States, 310 F. 2d 192 (9th Cir. 1962); United States v. Hoffa, 349 F. 2d 42 (6th Cir. 1965); Nelson v. United States, 375 F. 2d 740 (9th Cir. 1967).

Since joinder in the indictment and for trial was proper, appellant had the burden of showing prejudice resulting from the joinder in order to invoke the trial court's discretion and obtain a severance. In the absence of an affirmative showing that prejudice will result so as to deprive defendant of a fundamentally fair trial, a motion for severance should be denied. Sagansky v. United States, 358 F. 2d 195 (2nd Cir. 1966); cf. Williamson v. United States, 310 F. 2d 192 (9th Cir. 1966).

A general, unsupported allegation of prejudice is not sufficient to warrant severance of counts that are properly joined. United States v. Haun, 218 F. Supp. 923 (S. D. N. Y. 1963).

The right to a severance rests with the sound discretion of the trial court. Pointer v. United States, 151 U. S. 396, 400 (1894); United States v. Garrison, 265 F. Supp. 112 (1967); United States v. Hoffa, 349 F. 2d 43 (6th Cir. 1965). Absent an affirmative showing

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of an abuse of discretion, refusal to sever is not assignable as error. Stilson v. United States, 250 U.S. 583 (1919); Mendez v. United States, 349 F.2d 650 (9th Cir. 1965), cert. denied, 384 U.S. 1015 (1966). A fortiori, the trial court is not required to grant a severance, sua sponte, absent a showing of prejudice, as distinguished from a conclusory statement that prejudice resulted. Russell v. United States, 288 F.2d 520 (9th Cir. 1961), cert. denied, 371 U.S. 926 (1962).

Additionally, since appellant did not move for a severance below, he cannot present his claim that he was prejudiced by the joint trial for the first time on appeal. Cardarella v. United States, 351 F.2d 443 (8th Cir. 1965); United States v. Perk, 210 F.2d 457 (2nd Cir. 1954).

Noticeably, appellant made no claim of prejudice at any time in the trial court. Counsel for the co-defendant adverted to the possibility of a severance to enable the co-defendant to waive a jury [R.T. 13]. The jury was not waived by either defendant, nor was severance mentioned again.

Appellant makes no showing of prejudice, except that evidence of the December 22nd transaction was introduced at the trial against defendant Rivera. The court instructed the jury twice on this point [R.T. 444, 797-798]. There is no reason to presume that the jury was incapable of performing their sworn duty to consider each defendant separately and to adhere to the court's instructions, especially in view of the relatively simple facts of the case. See Peek v. United States, 321 F.2d 934 (9th Cir. 1963),

cert. denied, 376 U.S. 954 (1963); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), cert. denied, 374 U.S. 829 (1963); United States v. Hanlin, 29 F.R.D. 481 (D.C. Mo. 1962).

Appropriate instructions can obviate any possible confusion between the two defendants to be tried, and confine the jury's consideration to evidence produced as to each particular defendant. Spencer v. Texas, 385 U.S. 554 (1967); Delli Paoli v. United States, 352 U.S. 232, 242 (1957).

B. THE DENIAL OF CO-DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL CANNOT BE ASSERTED AS PREJUDICIAL ERROR AS TO APPELLANT.

Counsel for Rivera moved for a judgment of acquittal at the close of the case on the ground that co-defendant's witness, the Government informant, Greathouse, asserted the Fifth Amendment privilege. No such motion was made by appellant. The alleged prejudice to Rivera from the informant's conduct ostensibly affected Rivera's entrapment defense [R.T. 824-825]. Since Appellant did not assert, and clearly could not have asserted, the defense of entrapment for the reasons discussed below, Greathouse's assertion of the privilege was entirely immaterial to appellant's defense.

Additionally, the only questions not answered ultimately by the informant pertained to his consent to Agent Turnbou's monitoring the call and his discussion of narcotics with Turnbou. Those

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answers were irrelevant to the entrapment defense of either defendant, and clearly could have incriminated the witness.

Moreover, the privilege against self-incrimination has been interpreted liberally "in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). Unless it is " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency' to incriminate", the claim should be upheld. 341 U.S. at 488.

C. THE COURT PROPERLY INSTRUCTED THE JURY REGARDING ENTRAPMENT.

That a defendant who denies committing the acts charged is not entitled to an instruction on the defense of entrapment is settled in this Circuit. Garibza-Garcia v. United States, 362 F. 2d 509 (9th Cir. 1966); Ortega-Romero v. United States, 362 F. 2d 804 (9th Cir. 1966); Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965); Dunbar v. United States, 342 F. 2d 979 (9th Cir. 1965).

Appellant denied having committed the acts which constitute the crime [R. T. 769]. He failed to object to the instruction [R. T. 824], or to request an instruction [R. T. 375]. An appellant may not sit idly by in the face of an alleged error, assuming arguendo that an error was committed, and later take advantage of an error he helped create. United States v. Grosso, 358 F. 2d 154 (4th Cir. 1966).

Appellant chose not to assert entrapment as a defense, and told the trial court specifically that no such plea would be offered [R. T. 399]. Neither evidence, argument, nor an admission that appellant committed the acts alleged were offered by the appellant at the trial. He cannot litigate that issue for the first time on appeal. Holt v. United States, 303 F. 2d 791 (9th Cir. 1962); Smith v. United States, 287 F. 2d 270 (9th Cir. 1961), cert. denied, 366 U.S. 946 (1960); Johnston v. United States, 254 F. 2d 239 (8th Cir. 1958).

Appellant cannot rely upon his co-defendant's defense of entrapment, since appellant neither admitted the acts in question nor offered evidence that he was illegally entrapped. In fact, there is no evidence in the record to indicate that appellant had any contact with a Government agent or the informant prior to the arrest. In this connection, it is noteworthy that appellant cites no authority for his novel assertion that the entrapment defense raised by his co-defendant applies automatically to him.

D. THE RULE OF EVIDENCE CREATED BY STATUTE AS TO THE ORIGIN OF MARIHUANA POSSESSED IS CONSTITUTIONAL.

Title 21, United States Code, §176(a) provides in pertinent part that:

> "Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence

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> to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury."

This court has held there is no merit in the contention that this presumption is unconstitutional. Jefferson v. United States, 340 F. 2d 194, 199 (9th Cir. 1965). The presumption's validity has been affirmed repeatedly by this and other Circuit Courts. E. g., Caudillo v. United States, 253 F. 2d 513 (9th Cir. 1958), cert. denied, sub nom., Romero v. United States, 357 U. S. 931 (1958); Hunter v. United States, 339 F. 2d 425 (9th Cir. 1964); Borne v. United States, 332 F. 2d 565 (9th Cir. 1964); Robinson v. United States, 327 F. 2d 618 (8th Cir. 1964); Charles Toy v. United States, 266 Fed. 326 (2nd Cir. 1920).

E. THE SEARCH OF APPELLANT'S APARTMENT AND THE RESULTING SEIZURE OF EVIDENCE WERE INCIDENT TO A LAWFUL ARREST AND THEREFORE CONSTITUTIONAL.

Having failed to timely raise the issue by a motion to suppress the seized money or to object to its admission into evidence at the trial, appellant cannot now assert error on this ground. Woo Lai Chun v. United States, 274 F. 2d 708 (9th Cir. 1960); United States v. Monticallos, 349 F. 2d 82 (2nd Cir. 1965).

In any event, the ambit of a constitutionally permissible search and seizure includes a search and seizure incident to a

lawful arrest. Beck v. Ohio, 379 U.S. 89 (1964); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Reed v. United States, 364 F.2d 630 (9th Cir. 1966).

The search and seizure here challenged was incident to an arrest; thus, the question to be resolved is whether the arrest was lawful. The Supreme Court has said:

> "The lawfulness of the arrest without warrant . . . must be based upon probable cause, which exists where 'the facts and circumstances within their [the officer's], knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."
> Ker v. California, 374 U.S. 23, 35 (1964), quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949), and Carroll v. United States, 267 U.S. 132, 162 (1925).

The record discloses that the officers involved had probable cause to arrest Zaragoza on the following facts: Rivera was observed entering Zaragoza's house with $500 in previously recorded bills and coming out with five kilograms of marihuana [R.T. 77, 187, 265, 306]; prior to Rivera's exit, Chavez left Zaragoza's apartment and was found to have a $10 bill which had been given to him by Zaragoza; this bill was one of the previously recorded bills given to Rivera by Agent Turnbou [R.T. 265-266, 553, 556].

VII

CONCLUSION

For the foregoing reasons, it is submitted that the conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN